

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for CS/HB 369 Pub. Rec./Prearrest Diversion Programs
SPONSOR(S): Judiciary Committee
TIED BILLS: HB 857 **IDEN./SIM. BILLS:** CS/CS/CS/SB 450

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Merlin	Camechis

SUMMARY ANALYSIS

Section 943.059, F.S., currently sets forth procedures for sealing criminal history records. A person seeking to have a criminal record sealed must first obtain a certificate of eligibility ("COE") from the Florida Department of Law Enforcement ("FDLE") by paying a \$75 processing fee and satisfying other criteria. A petition to a court to seal a criminal history record is complete only when accompanied by a valid COE issued by FDLE and a sworn statement attesting that the petitioner:

- Has never, before the date on which the petition is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b), F.S.;
- Has not been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Has never secured a prior sealing or expunction of a criminal history record; and
- Is eligible for such a sealing to the best of his or her knowledge or belief and does not have any other petition to seal or any petition to expunge pending before any court.

Section 943.059(4), F.S., provides that if a criminal history record is ordered sealed by the court, it is confidential and exempt from the public records law, and is available only to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and other specified agencies for their licensing and employment purposes. A person may lawfully deny or fail to acknowledge the sealed arrest, except in specific circumstances.

HB 857 (2017), which is tied to this bill, creates s. 943.0586, F.S., allowing FDLE to administratively seal the criminal history record of a person upon notice by the clerk of the court that the state attorney declined prosecution, the case was dismissed or nolle prossed, or an acquittal or not guilty verdict was entered.

The PCS expands the public records exemption in s. 943.059(4), F.S., to include records that are sealed administratively under s. 943.0586, F.S., as created by HB 857. The PCS also provides for the repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal by the Legislature, and sets forth a statement of public necessity as required by the Florida Constitution.

The PCS may have a minimal fiscal impact on the state and local governments. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra*.

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption for the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program, and therefore requires a two-thirds vote for final passage.

The PCS takes effect on the same date that HB 857 or similar legislation takes effect. HB 857 takes effect on July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Records, Generally

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, s. 24(a) of the Florida Constitution provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption (public necessity statement), and is no broader than necessary to meet its public purpose.¹

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.

The Open Government Sunset Review ("OGSR") Act² provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose and the "Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."³ However, the exemption may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- Protect trade or business secrets.⁴

The OGSR Act requires the automatic repeal of a public records exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.⁵

Criminal History Records

A criminal history record includes the disposition of an arrest, whether it results in a conviction, acquittal, or dismissal of the charges before trial.⁶ Generally, Florida law allows dissemination of criminal justice information⁷ to the public. Section 943.053, F.S., provides that a person's criminal history information⁸ is available to criminal justice agencies for criminal justice purposes free of charge,

¹ FLA. CONST. art. I, s. 24(c).

² s. 119.15, F.S.

³ s. 119.15(6)(b), F.S.

⁴ *Id.*

⁵ s. 119.15(3), F.S.

⁶ Florida Department of Law Enforcement, *Seal and Expunge Frequently Asked Questions*, http://www.fdle.state.fl.us/cms/Seal-and-Expunge-Process/Frequently-Asked-Questions.aspx#Charges_dropped_dismissed (last visited Feb. 5, 2017).

⁷ "Criminal Justice Information" means information on individuals collected or disseminated as a result of arrest, detention, or the initiation of a criminal proceeding by criminal justice agencies, including arrest record information, correctional and release information, criminal history record information, conviction record information, offender registration information, identification record information, and wanted persons record information." s. 943.045(12), F.S.

⁸ "Criminal history information" means "information collected by criminal justice agencies on persons, which information consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and the

and to persons in the private sector upon payment of a fee.⁹ Persons seeking to prevent such disclosure may obtain a court order making criminal history records confidential and exempt from the provisions of s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution by petitioning for:

- Court-ordered sealing,¹⁰ or
- Court-ordered expunction.¹¹

Effect of a Criminal History Record

Research estimates that as many as one in three adults in the United States have a criminal record.¹² The Federal Bureau of Investigation maintains a database of records compiled when a suspected offender is arrested and fingerprinted by local, state, or federal law enforcement agencies.¹³ Private consumer reporting agencies offer background reports for sale to employers, but often times utilize databases that may include outdated court records.¹⁴ Consequently, any contact with the criminal justice system, including arrests that do not lead to conviction, can have long-lasting effects on a person's employment, housing, education and other opportunities.¹⁵

Sealing of Criminal History Records

In Florida, courts have jurisdiction over their own judicial records containing criminal history information and over their procedures for maintaining and destroying those records, and s. 943.059, F.S., sets forth procedures for sealing criminal history records.¹⁶

Currently, Florida law provides that a person seeking to have a criminal record sealed must first obtain a certificate of eligibility ("COE")¹⁷ from the Florida Department of Law Enforcement ("FDLE"). Section 943.059(2), F.S., provides that FDLE shall issue a certificate of eligibility for sealing to a person who is the subject of a criminal history record provided that such person:

- Has submitted to FDLE a certified copy of the disposition of the charge to which the petition to seal pertains;
- Remits a \$75 processing fee to the department for placement in the FDLE Operating Trust Fund, unless such fee is waived by the executive director;
- Has never, before the date on which the application for a certificate of eligibility is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b), F.S.;
- Has not been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Has never secured a prior sealing or expunction of a criminal history record; and
- Is no longer under court supervision applicable to the disposition of the arrest or alleged criminal activity to which the petition to seal pertains.¹⁸

disposition thereof. The term does not include identification information, such as biometric records, if the information does not indicate involvement of the person in the criminal justice system." s. 943.045(5), F.S.

⁹ s. 943.053(3)(a), F.S.

¹⁰ s. 943.059, F.S.

¹¹ s. 943.0585, F.S.

¹² Matthew Friedman, Brennan Center for Justice at New York University School of Law, *Just Facts: As Many Americans Have Criminal Records As College Diplomas*, <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas> (last visited Feb. 6, 2017).

¹³ *Id.*

¹⁴ The result being that even some expunged arrests are reported to employers. Brendan Lynch, Talk Poverty, *Never Convicted, but Held Back by a Criminal Record*, <https://talkpoverty.org/2014/12/09/held-back-by-a-criminal-record/> (last visited Feb. 6, 2017).

¹⁵ Justice Center, The Council of State Governments, *Clean Slate Clearinghouse*, <https://csgjusticecenter.org/cleanslate> (last visited Feb. 6, 2017).

¹⁶ s. 943.059, F.S.

¹⁷ s. 943.059(2), F.S.

¹⁸ s. 943.059(2)(a)-(f), F.S.

A petition to a court to seal a criminal history record is complete only when accompanied by a valid COE issued by FDLE and a sworn statement attesting that the petitioner:

- Has never, prior to the date on which the petition is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b), F.S.;
- Has not been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Has never secured a prior sealing or expunction of a criminal history record; and
- Is eligible for such a sealing to the best of his or her knowledge or belief and does not have any other petition to seal or any petition to expunge pending before any court.¹⁹

Section 943.059(4), F.S., provides that if a criminal history record is ordered sealed by the court, it is confidential and exempt from the provisions of s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution, and available only to:

- The person who is the subject of the record, or their attorney;
- Criminal justice agencies for criminal justice purposes;²⁰
- Judges who are assisting in their case-related decisionmaking responsibilities; and
- Certain entities for licensing, access authorization, and employment purposes.²¹

An order sealing a criminal history record does not require the record be destroyed and criminal justice agencies may continue to maintain the record. An adult, whose criminal history record has been sealed, may lawfully deny or fail to acknowledge the arrest covered by the sealed record, except in certain specific instances.²²

HB 857

HB 857 (2017), which is tied to this bill, creates s. 943.0586, F.S., allowing FDLE to administratively seal the criminal history record of a person upon notice by the clerk of court that the state attorney declined prosecution, the case was dismissed or nolle prossed, or an acquittal or not guilty verdict was entered. This changes current law which requires persons to apply to FDLE and pay a \$75 fee to seal such records. It also allows an unlimited number of administrative record sealings by FDLE under the circumstances identified above; whereas, current law only authorizes one sealing and requires court approval.

Effect of the Bill

The bill expands the public records exemption²³ in s. 943.059(4), F.S., to include records that are sealed administratively under s. 943.0586, F.S., as created by HB 857 (2017). The bill also provides that administratively sealing a record under s. 943.0586, F.S., has the same effect as sealing under s. 943.059, F.S.

¹⁹ s. 943.059(1)(a)-(b), F.S.

²⁰ Such purposes include conducting criminal history background check for firearms purchases and transfers. s. 943.059(4), F.S.

²¹ *Id.*

²² The subject of the record may not deny the existence of the sealed record when they are seeking employment with a criminal justice agency; a defendant in a criminal prosecution; concurrently or subsequently petitions for either expunction or sealing; seeking admission to the Florida Bar; seeking certain employment or professional licenses; seeking appointment as a guardian; subject to a background check when attempting to purchase a firearm; or seeking a license to carry a concealed weapon or firearm. s. 943.059(4)(a), F.S.

²³ There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates as confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, the record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute.

The bill repeals the exemption on October 2, 2023, unless reviewed and saved from repeal by the Legislature, pursuant to the OGSR Act.

The bill provides a statement of public necessity as required by the State Constitution.²⁴ The statement includes the following findings:

- The Legislature finds that it is a public necessity that the criminal history records of a minor or an adult, which have been administratively sealed pursuant to s. 943.0586, F.S., be made confidential and exempt from s. 119.07(1), F.S., and Article I, s. 24(a) of the Florida Constitution.
- The presence of a criminal history record in an individual's past which has not been validated through a criminal proceeding can jeopardize a person's ability to obtain education, employment, and other achievements necessary in becoming a productive, contributing, self-sustaining member of society.
- Such negative consequences are unwarranted in cases in which the individual was not found to have committed the offense that is the subject of the sealed criminal history record.

The bill provides that it shall take effect on the same date that HB 857 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

B. SECTION DIRECTORY:

Section 1. Amends s. 943.0586, F.S., as created by HB 857 (2017), relating to administrative sealing of criminal history records.

Section 2. Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.

Section 3. Provides a public necessity statement.

Section 4. Provides an effective date for the same date that HB 857 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

²⁴ FLA. CONST. art. I, s. 24(c).
STORAGE NAME: pcs0369.JDC
DATE: 4/18/2017

None.

D. FISCAL COMMENTS:

The bill could have a minimal impact on agencies because agency staff responsible for complying with public records requests may require training related to the creation of the public record exemption. In addition, agencies could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed by existing resources, as they are part of the day-to-day responsibilities of agencies.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or newly expanded public record or public meeting exemption. The bill creates a public record exemption; therefore, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; therefore, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a limited public record exemption for the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program which does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or require additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A.